

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Emily Devaney	Team: Squad #1	CCRB Case #: 201901960	<input checked="" type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Tuesday, 02/26/2019 11:00 PM	Location of Incident: East 112th Street and 3rd Avenue	Precinct: 23	18 Mo. SOL 8/26/2020	EO SOL 4/12/2021	
Date/Time CV Reported Wed, 02/27/2019 12:14 AM	CV Reported At: IAB	How CV Reported: Phone	Date/Time Received at CCRB Tue, 03/05/2019 12:37 PM		

Complainant/Victim	Type	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. POM Michael Laborde	05867	954037	023 PCT
2. LT Javier Familia	00000	932618	023 PCT

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. POM Jonathan Goenner	15852	941821	023 PCT
2. POM Gregory King	26847	942010	023 PCT
3. POM Michael Gagliardo	21607	959645	023 PCT

Officer(s)	Allegation	Investigator Recommendation
A.POM Michael Laborde	Force: Police Officer Michael Laborde pointed his gun at § 87(2)(b)	
B.POM Michael Laborde	Abuse: Police Officer Michael Laborde frisked § 87(2)(b)	
C.POM Michael Laborde	Abuse: Police Officer Michael Laborde searched § 87(2)(b)	
D.POM Michael Laborde	Abuse: Police Officer Michael Laborde searched the vehicle in which § 87(2)(b) was an occupant.	
E.LT Javier Familia	Abuse: Lieutenant Javier Familia interfered with § 87(2)(b)'s use of a recording device.	
F.LT Javier Familia	Abuse: Lieutenant Javier Familia searched § 87(2)(b)'s recording device.	
G.POM Michael Laborde	Abuse: Police Officer Michael Laborde interfered with § 87(2)(b)'s use of a recording device.	
H.POM Michael Laborde	Abuse: Police Officer Michael Laborde threatened to arrest § 87(2)(b)	
§ 87(4-b) § 87(2)(g)		

Case Summary

On February 27, 2019, § 87(2)(b) filed this complaint with IAB over the phone. IAB forwarded this complaint to the CCRB where it was received on March 5, 2019.

On February 26, 2019, at approximately 11:00 p.m., § 87(2)(b) was driving his car when Lieutenant Javier Familia, Police Officer Michael Laborde, and Police Officer Michael Gagliardo, all from the 23rd Precinct, pulled him over at the intersection of Third Avenue and 112th Street in Manhattan. PO Laborde pointed his gun at the car as he approached and ordered § 87(2)(b) out of the vehicle (**Allegation A: Force**, § 87(2)(g)). PO Laborde frisked and searched § 87(2)(b) (Allegations B-C: Abuse of Authority, § 87(2)(g)). PO Laborde searched § 87(2)(b)'s vehicle (**Allegation D: Abuse of Authority**, § 87(2)(g)). Lt. Familia told § 87(2)(b) to put his phone away and then took the phone out of § 87(2)(b)'s hand (**Allegation E: Abuse of Authority**, § 87(2)(g)). § 87(2)(b) alleged that Lt. Familia intentionally ended the recording on his phone (**Allegation F: Abuse of Authority**, § 87(2)(g)). PO Laborde issued § 87(2)(b) a summons for having illegally tinted windows. PO Laborde told § 87(2)(b) to put his phone down and threatened to arrest § 87(2)(b) (**Allegation G-H: Abuse of Authority**, § 87(2)(g)).

There are four body-worn camera videos (Board Review 01-04). § 87(4-b), § 87(2)(g). § 87(2)(b) also provided two cell phone videos he took at the scene (Board Review 05-06).

Findings and Recommendations

Allegation (A) Force: Police Officer Michael Laborde pointed his gun at § 87(2)(b)

It is undisputed that § 87(2)(b) was driving north on Third Avenue in his car which had windows tinted beyond the legal limit. PO Laborde, Lt. Familia, and PO Gagliardo pulled over his car.

§ 87(2)(b) testified that he pulled over his vehicle immediately after the officers turned on their lights. § 87(2)(b) picked up his cell phone from the cup holder. § 87(2)(b) turned on the camera and put the phone on his lap. § 87(2)(b) looked to his left and saw PO Laborde pointing a gun at his car door. PO Laborde told § 87(2)(b) to roll down his window, which he did. § 87(2)(b) stated that it was less than ten seconds after he stopped the car until PO Laborde told him to roll down the windows. PO Laborde subsequently holstered his weapon (Board Review 07-09).

PO Laborde testified that § 87(2)(b) did not pull his car over for three blocks after PO Laborde turned on his lights and siren (Board Review 10). PO Laborde exited the police car and told § 87(2)(b) to roll down his windows between six and ten times. After approximately 30 seconds, § 87(2)(b) rolled down the driver's window a few inches. PO Laborde saw § 87(2)(b) lean forward and move side-to-side. PO Laborde drew his weapon because he suspected § 87(2)(b) might have a weapon. PO Laborde believed § 87(2)(b) might have a weapon because § 87(2)(b) did not pull over right away, he did not fully roll down the windows when requested to do so, his hands were not visible to PO Laborde, and his movement in the car. PO Laborde denied pointing his gun at § 87(2)(b) or the car. After an additional 15 seconds, § 87(2)(b) fully lowered the driver's window only. PO Laborde holstered his weapon when he saw that § 87(2)(b) did not have anything in his hands.

Lt. Familia stated that § 87(2)(b) pulled over immediately after the officers signaled for him to

stop (Board Review 11). The officers ordered § 87(2)(b) to roll down the windows multiple times. When he did lower the window, he only lowered the driver's window. Lt. Familia, who stood on the passenger side, could not see if § 87(2)(b) made any movement in the vehicle. Lt. Familia suspected the driver might have weapons that could hurt the officers because he could not see inside the car and § 87(2)(b) did not roll down the windows when told to do so.

Body-worn camera videos do not show the initial interaction between PO Laborde and § 87(2)(b) (Board Review 01-04).

According to Patrol Guide Procedure 221-01, the decision to display and draw a firearm should be based on the articulable belief that the potential for serious physical injury is present (Board Review 12).

The safety of a police officer is placed in jeopardy whenever the officer approaches a stopped vehicle to investigate an apparent or suspected violation of law, since the potential threat of a successful assault always exists due to the concealed and dangerous movements of a person seated in the vehicle. While these usual hazards of a motor vehicle stop would not likely result in an officer drawing their weapon, additional circumstances that heighten the danger warrant officers to draw their guns as a protective action for their safety. People v. Livigni, 88 A.D. 2d 386 (1982) (Board Review 13).

§ 87(2)(g)

Allegation (B) Abuse of Authority: Police Officer Michael Laborde frisked § 87(2)(b)

Allegation (C) Abuse of Authority: Police Officer Michael Laborde searched § 87(2)(b)

Allegation (D) Abuse of Authority: Police Officer Michael Laborde searched the vehicle in which § 87(2)(b) was an occupant.

It is undisputed that PO Laborde ordered § 87(2)(b) out of the vehicle, frisked him, and searched him. PO Laborde then searched § 87(2)(b)'s vehicle.

PO Laborde testified that he ordered § 87(2)(b) out of the vehicle due to the above-mentioned concerns of a weapon (Board Review 10). Either before asking § 87(2)(b) to step out of the vehicle or after § 87(2)(b) opened the door, PO Laborde smelled the odor of marijuana. PO Laborde testified that he is very familiar with the odor of marijuana because he received the NYPD's marijuana field training in 2018, and 80-90% of his arrests involved marijuana.

PO Laborde frisked § 87(2)(b) because he smelled marijuana and for his safety. As he patted § 87(2)(b)'s jacket pocket, PO Laborde felt a small, hard object. PO Laborde was unable to describe the object during his interview. PO Laborde asked § 87(2)(b) what the object was, but § 87(2)(b) did not reply. PO Laborde entered § 87(2)(b)'s pocket and removed the item for his safety. The object was a pill bottle. PO Laborde opened the pill bottle and noticed vegetative marijuana residue and an odor of marijuana emanating from the pill bottle. § 87(2)(b) told PO Laborde that he had a medicinal marijuana card. PO Laborde stated that § 87(2)(b)

§ 87(2)(b)'s medical card did not allow § 87(2)(b) to carry herbal marijuana. PO Laborde searched § 87(2)(b)'s car because he suspected there could be a weapon or marijuana inside the car.

§ 87(2)(b) testified that he does not nor did he smoke marijuana in the car at any point (Board Review 07-09). § 87(2)(b) does not smoke marijuana. § 87(2)(b) stated that he had never driven any passengers who smoked marijuana in his car. The pill bottle in his pocket was empty, but previously contained Baclofen pills, a medication to treat back pain. § 87(2)(b) stated that neither the pill bottle nor his car smelled like marijuana.

The body-worn camera videos from Police Officers Gregory King and Jonathan Goenner, both from the 23rd Precinct, showed that, when PO Laborde asked § 87(2)(b) about the hard object in his pocket, § 87(2)(b) did not answer (Board Review 01-02). After PO Laborde removed the pill bottle, he asked § 87(2)(b) if he had marijuana in the car. § 87(2)(b) denied having marijuana in the car or on his person, but he admitted to having a medicinal marijuana card. The videos showed that § 87(2)(b) handed PO Laborde a medicinal marijuana card. This can be seen from the beginning to the 3:38 minute-mark of the player's timestamp.

The smell of marijuana is sufficient to provide officers with probable cause to search an automobile and its occupants, People v. Chestnut, 43 A.D.2d 260 (1974) (Board Review 14).

§ 87(2)(g)

Allegation (E) Abuse of Authority: Lieutenant Javier Familia interfered with § 87(2)(b)'s use of a recording device.

Allegation (F) Abuse of Authority: Lieutenant Javier Familia searched § 87(2)(b)'s recording device.

It is undisputed that while PO Laborde searched § 87(2)(b)'s vehicle, § 87(2)(b) stood at the rear of the vehicle with Lt. Familia and PO Gagliardo. § 87(2)(b) had his cell phone in his hand. Lt. Familia told him to put the phone away multiple times, but § 87(2)(b) refused. Lt. Familia took the phone from § 87(2)(b)'s hand and placed it on the trunk of the car.

§ 87(2)(b) testified that he told the officers that he believed the officers did not want § 87(2)(b) to record the interaction because the officers knew they were doing something wrong (Board Review 07-09). PO Gagliardo told § 87(2)(b) that the officers were recording on their body-worn cameras. When § 87(2)(b) reviewed his cell phone video after the incident, he saw that Lt. Familia ended the video recording when Lt. Familia took the phone from his hand.

Lt. Familia testified that he did not know if § 87(2)(b) was recording the interaction (Board Review 11). § 87(2)(b) appeared angry and told the officers that they should not have removed him from the vehicle and searched it. § 87(2)(b) had his phone in his hand and pointed it at Lt. Familia and PO Gagliardo. Lt. Familia told § 87(2)(b) to put the phone away multiple times. Lt. Familia wanted § 87(2)(b) to put the phone away because he was afraid § 87(2)(b) would use it as a weapon to hit the officers in his anger. Lt. Familia told § 87(2)(b) to put his phone away multiple times, but § 87(2)(b) refused each time. Lt. Familia took the phone out of the driver's hand because the driver refused to put it away and Lt. Familia did

not feel safe. Lt. Familia stated that this was the only reason he took the phone from § 87(2)(b). Lt. Familia did not know if he ended any video recording when he took the phone or if he looked at the phone at all.

Between the 4:51 and 5:35 minute-mark, PO King's body-worn camera video showed that Lt. Familia placed his hand on top of § 87(2)(b)'s phone while it is still in § 87(2)(b)'s hand for approximately four seconds (Board Review 01). § 87(2)(b)'s cell phone video showed Lt. Familia's hand over his phone beginning at the 1:09 minute-mark until the video ends at 1:18 (Board Review 06). The recording ended while Lt. Familia was touching the phone but before he removed the phone from § 87(2)(b)'s hand.

Patrol Guide Procedure 203-29 states that individuals have a right to lawfully record police activity (Board Review 15). This right can be limited for the safety of officers or when a violation of law is committed by the individual who is videotaping. The procedure states that officers should not block or obstruct cameras when there is no legitimate law enforcement reason to do so.

§ 87(2)(g)
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Allegation (G) Abuse of Authority: Police Officer Michael Laborde interfered with § 87(2)(b)'s use of a recording device.

Allegation (H) Abuse of Authority: Police Officer Michael Laborde threatened to arrest § 87(2)(b).

§ 87(2)(b) testified that after he returned to the driver's seat, PO Laborde returned to § 87(2)(b) and handed him a summons for having illegally tinted windows (Board Review 07-09). § 87(2)(b) attempted to record the incident on his cell phone again, but PO Laborde told him to put his phone down. PO Laborde told § 87(2)(b) that he could be arrested. § 87(2)(b) acknowledged during his interview that he was driving with an expired license at the time.

PO Laborde's body-worn camera video showed that § 87(2)(b) argued with PO Laborde about the officer's reason for the stop, between the 8:10 and 9:09 minute-mark (Board Review 04). PO Laborde tells § 87(2)(b) "If you don't [put your phone down], I'm going to bring you in for not having a license. Because your license is expired. So put the phone down so I can give you a ticket." § 87(2)(b) put his phone down and PO Laborde handed him the ticket.

PO Laborde testified that he learned § 87(2)(b)'s license was expired when he was writing the summons (Board Review 10). PO Laborde used his discretion and decided not to take law enforcement action regarding § 87(2)(b)'s expired license. PO Laborde explained that he told § 87(2)(b) to put his phone down so that PO Laborde could hand him the ticket. PO Laborde did not know if § 87(2)(b) was attempting to record, but PO Laborde did not intend to interfere with the recording. PO Laborde wanted § 87(2)(b)'s hands free so that he could take the summons.

Patrol Guide Procedure 203-29 states that individuals have a right to lawfully record police activity (Board Review 15). This right can be limited for the safety of officers or when a violation of law is committed by the individual who is videotaping. The procedure states that officers should not block or obstruct cameras when there is no legitimate law enforcement reason to do so.

§ 87(2)(g)

New York Vehicle & Traffic Law § 509 states that no person shall drive a motor vehicle upon a public highway unless he is duly licensed (Board Review 16). A violation of this law is punishable by a fine or imprisonment.

§ 87(2)(g)

§ 87(4-b), § 87(2)(g)

Civilian and Officer CCRB Histories

- This is the first CCRB complaint to which § 87(2)(b) has been a party (Board Review 18).
- PO Michael Laborde has been a member of service for six years and has been a subject in 11 CCRB complaints and 38 allegations, of which one was substantiated (Board Review 19):
 - 201802439 involved a substantiated allegation of a question against PO Laborde. The Board recommended Formalized Training and the NYPD imposed Formalized Training.
 - § 87(2)(g)
- Lt. Javier Familia has been a member of service for 16 years and has been a subject in four CCRB complaints and nine allegations, none of which were substantiated. § 87(2)(g)

§ 87(2)(g)

Mediation, Civil and Criminal Histories

- § 87(2)(b) declined to mediate this complaint.
- As of November 21, 2019, the New York City Office of the Comptroller has no record of a Notice of Claim being filed in regard to this complaint (Board Review 20).
- [§ 87(2)(b)] [§§ 86(1)(3)&(4)] [§ 87(2)(c)]

Squad No.: _____

Investigator:	_____	_____	_____
	Signature	Print Title & Name	Date

Squad Leader:	_____	_____	_____
	Signature	Print Title & Name	Date

Reviewer:	_____	_____	_____
	Signature	Print Title & Name	Date